CHAPTER 4. *Constitutional Rights and Responsibilities in Planning*

CONTENTS

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Community planning must balance many issues and countervailing forces while creating an outline or model for growth. A framework of rules and regulations, designed to limit and shape the authority of the planning process, covers constitutional rights, duties and obligations of municipalities as a whole (and the citizens they represent generally), and property owners and citizens directly involved in the planning process.

Constitutional rights and responsibilities must be met and balanced in the heat of the moment, in cases that can tear at a community.[1] Citizens will cry for action before a lay group that is not always trained, or even specifically advised, on legal issues. This chapter will help public agencies identify the two constitutional issues most directly affected by planning—**due process** and **the taking issue**—and suggests when additional guidance may be needed.

"Due process" has two components: 1) "Procedural," which says that a rule or action was properly adopted after proper notice and opportunity to be heard; and 2) "Substantive," which means the rule or action gives adequate notice of what is intended or regulated, and is reasonably related to a matter appropriate for government regulation.

"Taking" is the right not to be deprived of property without just compensation.

A. Due Process

Due process is the primary constitutional issue dealt with in planning. Due process arises under the Washington State Constitution, Article I § 3, and Article V of the U.S. Constitution, as applied to state action through the Fourteenth Amendment to the Constitution.

As applied to planning, due process most commonly takes these forms:

- Procedural Due Process—a right to have certain rules followed before significant changes occur to one's rights, responsibilities, or property.

- Substantive Due Process—the right to have rules adopted that are reasonable in aim and scope, and that are targeted to objectives appropriate for municipal action.

Washington state is fortunate to have several decisions in which the courts have gone out of their way to articulate due process guidelines and principles. These are helpful in evaluating situations and making decisions.

1. Procedural Due Process

Adequate notice is the prerequisite of any lawful municipal action. State law requires municipal agencies to establish regular meeting times and places, and to publish special notices for meetings held at other than regularly scheduled times. Failure to give proper notice of a meeting will invalidate any action taken at that meeting.

Planning cases require special, rather than general, notice. It is not sufficient merely to give notice that a meeting usually will occur. Courts have held:

> *Procedural due process requires notice which is reasonably calculated under the circumstances to apprise affected parties of the pending action and to afford them an opportunity to present their objections.*[2]

When a county enacts or amends a zoning ordinance, it is required by statute to give notice of the time, place, and purpose of the meeting.[3] Where the board is to consider amendments to the proposed ordinance, the text of the amendments must be available for review in advance of the hearing.

Finally, if an action of a council deprives a property owner of a right previously enjoyed, personal notice and hearing are required.[4] This would apply, for example, to a zoning ordinance that seeks to terminate existing practices (eliminate vested rights), rather than merely regulate or prevent new uses from occurring in the future. Personal notice and hearing would be required before taking effect.

PRACTICE TIP:

Communities are encouraged to adopt notice policies reasonably calculated to notify interested or affected parties. Major changes may require extra notice, such as large signs on affected property or direct mail to owners of record and residents.

Notices to "owners of record" may be inadequate in some cases with substantial effect on tenants, or when county records lag weeks or months behind local real estate transactions. (Addresses on record at the county often are mortgage companies more interested in having taxes paid on time than forwarding official notices to owners or tenants possibly affected by planning activities.)[5]

2. Substantive Due Process—Proper Exercise of the Police Power

Substantive due process is divided into cases that concern:

- The overall propriety of the action taken, or the limits of the "police power" in general;
- The clarity with which the action is taken, known as the "vagueness" inquiry; and,
- The connection between the action taken and the problem created by a project or proposal, known as the "nexus" inquiry.

Two separate and distinct inquiries must be made:

- The nature and purpose of the decision to use regulation, rather than acquisition, to secure the municipal rights in question.
- The nature of the municipal rights secured, and the reasonableness of the use remaining after the regulation is imposed.

Both of these inquiries are considered part of the "taking issue."

To analyze a municipal regulation under a substantive due process challenge, courts will make a three-part substantive inquiry.[6] To understand the nature of the inquiry, planning commissions and their respective boards and councils should consider and address the following issues:

- **Does the regulation seek to achieve a "legitimate public purpose"?**

In most cases, planning enactments seek to protect stated community values; the "object" or "purpose" of the planning effort will be deemed legitimate. For example, regulations aimed at protecting public health and water quality seek to

achieve a legitimate public purpose.[7] On occasion, a community may want to adopt planning rules that give one constituency a competitive advantage over another. Courts would certainly scrutinize this legislation closely. If improper purpose is shown, the presumption of validity may be overcome.

- **Are the means used to accomplish the lawful purpose "reasonably necessary" to achieve that purpose?**

  Even when a stated aim is proper, courts will examine whether the means chosen are appropriate.[8] In protecting neighborhood values, for example, a municipality might require modern construction techniques and adequate storage before permitting modular housing in a community. The municipality could be challenged, however, if it assumes that modular housing is always inferior (a demonstrably false assumption), and seeks to ban modular housing or "mobile homes" to "protect the quality of single-family neighborhoods."

- **Is the chosen regulation "unduly burdensome" on the land owner?**

  This inquiry aims at balancing the municipality's interests with those of the regulated property owner. The greater the public harm, up to a point, the greater the public intrusion warranted in solving the harm. The greater the intrusion on the use of the property, the closer the scrutiny required—based on whether a less intrusive alternative would have accomplished the same result; or whether it is fair to make the property owner bear the burden of solving a community problem.

  In making the "unduly burdensome" inquiry, courts and commentators have developed a list of inquiries to help evaluate the issues involved:[9]

  - The nature of the harm to be avoided;
  - Whether less drastic protective measures are available and effective; and,
  - The economic loss suffered by the property owner.

  Another formulation asks these relevant questions:[10]

  - **On the public side**: the seriousness of the public problem, the extent to which the owner's land

contributes to the problem, the degree to which the proposed regulation solves the problem, and the feasibility of less oppressive solutions; and,

- **On the owner's side**: the amount and percentage of value lost, the extent of remaining uses (past, present, and future), the temporary or permanent nature of the regulation, the extent to which the owner should have anticipated the regulation, and how feasible it is for the owner to alter present or currently planned uses.

When a regulation fails to pass the balancing test, or where it goes too far (either on its face or as applied to a single parcel), the remedy is to invalidate the ordinance.[11]

3. Substantive Due Process—The Vagueness Inquiry

If a municipal regulation is to be enforceable, it cannot be unconstitutionally vague. People enforcing the regulation, and those affected by it, must have a sense of the nature and extent of the regulation and the conduct it permits or prohibits.

Courts have held ordinances unconstitutionally vague in the following context:

> *An ordinance is unconstitutional when it forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application...Such an ordinance violates the essential element of due process of law—fair warning.*[12]

In the cited case, a zoning ordinance permitted a "limited degree" of manufacturing in a commercial zone. The question was whether certain machinery fell inside or outside the permitted uses. As stated by the court:

> *In the area of land use a court does not look solely at the face of the ordinance; the language of the ordinance is also tested in its application to the person alleged to have violated it. ...The purpose of the void for vagueness doctrine is to limit arbitrary and discretionary enforcement of the law.*[13]

The court invalidated the ordinance's proscription of "limited use" because, as applied to the machine in question, no one could know or understand the reasonable limitations intended.

A similar situation existed in a city where a design review ordinance called for buildings to be "in good relationship" with the surrounding views, have "appropriate proportions" and "harmonious colors," and be "interesting."[14] In the transition between the old town and a nearby development area, the court found the design review commission could not express the code requirements in other than personal preferences. As such, the code as applied to the building in question was unenforceable.[15]

While aesthetic issues can be difficult to articulate, communities may want to use a combination of words and designs to express the range of options in which a project should operate.

If a city wishes to enforce a "statement" or a "policy," it must first pass some ordinance or regulation that gives standing to the policy or statement. Mere expressions of preference, without more, cannot be a basis for denying land use decisions. As noted by the Court,

> *The commissioners' individual concepts [of "policy"] were as vague and undefined as those written in the code. This is the very epitome of discretionary, arbitrary enforcement of the law.*[16]

If a municipality is to avoid a claim of vagueness, it must create a standard (in words and pictures, if needed) that permits those involved in the process to understand what is expected or required.[17] Alternatively, the Legislature must set up a process for creating a standard that can be fairly and uniformly applied, and reviewed in subsequent cases.

4. Substantive Due Process—The Nexus Issue

The "nexus" issue involves the extent to which a municipality can impose a requirement on a particular individual to solve a specific problem, or respond to a community need. There must be a logical connection between the problem the community is trying to solve and the limitation, regulation or exaction sought by municipal action.

The earliest example of the "nexus" doctrine arises in a United States Supreme Court case known as **Nollan**.[18] In the **Nollan** case, the California Coastal Commission sought to require a property owner to dedicate a beach front public walkway as a condition to a request to remodel a home.

The court noted that a municipality could acquire a beach front walkway at any time by condemnation. The question in the case is whether the municipality could require the owner to dedicate the walkway without compensation, since the owner was seeking a permit to remodel the house on the lot.

The court's answer was "no," a beach front walkway was beyond the authority of the community in this case.

In deciding the case, the court said *there must exist some logical connection between the problem identified, the municipal interest, and the solution proposed.* Thus, a municipality could require setbacks from side yards for safety or aesthetic reasons, because construction of a house raises both issues. But appropriation of a walkway across a back yard for public use did not solve a problem created by construction of the house. It only contributed to solving a public need—a linear park along the waterfront. Since there was no connection between the impacts caused by the project and the exaction sought by the municipality, the exaction could not be required, no matter how important the improvement was to the community. The question is not the importance of the public need, but the fairness of imposing the solution of that need on the builder of a nearby project.

The "nexus" requirement received additional attention in the recent case known as **Dolan**.[19] In **Dolan**, the municipality imposed conditions on a building permit requiring the applicant to permanently dedicate a portion of its land for storm drainage and as a pedestrian/bicycle path. The applicant argued that the City failed to adequately justify the conditions with the required "nexus."[20]

The United States Supreme Court agreed with the applicant/property owner. The court reaffirmed its decision in **Nollan**, and added that the "nexus" test asks whether there is a "rough proportionality" between the condition imposed and the impact intended to be mitigated by that condition.[21] The most important feature of **Dolan**, however, for the local planner is that the court in **Dolan** turned the "burden of proof" in these cases on its head. Prior to **Dolan**, courts had required applicants to bear the burden of proving that the conditions

were unconstitutional. The **Dolan** court reversed the burden and required local governments to prove that they had justified the condition with the necessary "nexus."[22] This represents a fundamental shift for local governments.

Planning staffs must now begin at the review stage of an application and not wait until the applicant has appealed the decision or filed a lawsuit. Planners are encouraged to explain in detail the reasons for imposing any exaction, the connection to the anticipated impact, and the desired result of the exaction.

Municipal actions that appropriate private property for public use (rather than regulate activity on the site), will usually be examined closely.[23] The appropriation must be warranted to solve a particular impact, not merely to meet a community need.

In a similar case in Washington state, a city could not require a developer to complete an adjoining roadway near a project under construction, where the construction did not cause the need for the roadway.[24] (See Chapter 5 for further discussion on the limitations of development conditions.)

B. The Taking Issue

PRACTICE TIP: ***When commissioners and council members are drafting an ordinance that requires improvements as a condition of seeking a permit, they must assure a stated connection between the approval given, a particular on-site or off-site improvement or dedication, and the impact to be mitigated.***

Where project-specific approvals are concerned, the decision maker should make specific findings on the issue of impacts and the fairness of imposing specific improvements that respond to these impacts.

The United States Constitution states that property shall not be taken without just compensation. Similarly, the Washington State Constitution states that property should not be damaged or taken without just compensation.[25] Of all the challenges to land use regulations, the one most frequently heard is that property has been "taken" through the regulatory process.

Commissioners and council members involved in regulating land frequently face the question of unjust taking. People who see substantial reductions in property value, or significant limitations on the uses of property, will feel that government should pay for the devaluation. All of these claims are analyzed under the taking issue doctrine.

Takings claims arise in three circumstances: (1) when property has been physically invaded or appropriated; (2) when land-use regulations deprive an owner of a reasonable use of his or her property; and, (3) when conditions are imposed on land-use permits.

1. Physical Invasion or Appropriation

Historically, a physical invasion of property had to occur before a court would find that property had been "taken" in violation of the constitution. Today, the appropriation of property by government continues to be a common ground for a takings challenge, such as the **Nollan** and **Dolan** cases discussed above. A right of public access or use, or across private property, may be for people, utilities, or stormwater, and usually requires compensation—unless the municipality can show that the facility need was generated by the project requiring the appropriation.

2. Regulations Affecting Reasonable Use

If the municipality is not acquiring a public right in the property (and is merely limiting the owner's use), the only "taking issue" question is whether the regulation leaves the owner a reasonable use of the property.[26]

While "reasonable use" limitations are based on individual cases, courts routinely uphold planning or other land use regulations designed to create a well ordered community. These include zoning patterns[27] and regulations that protect public health and safety or environmental concerns, such as wetland regulations,[28] even when these actions substantially reduce the property's fair market value.

The rationale for this is based on Washington's broad vesting rules. Each individual is entitled to use property according to the laws on the books at the time an application is made. A property owner who wants to take advantage of a particular zone or right can do so, simply by filing and processing an application.

However, no law requires a community to hold a zone available forever. If a community decides to change zoning to serve the needs of the larger community, it may do so, even if this limits or takes away previously authorized rights to use property.

In looking at a "taking" claim based on regulatory enactments, the court will look at several factors:

> *...The "threshold inquiry" ...is whether the challenged regulation safeguards the public interest in health, safety, the environment or the fiscal integrity of an area. A regulation*

> *which does that is to be contrasted with one which goes beyond preventing a public harm and actually enhances a publicly owned right in property. Secondly, the court should ask whether the regulation destroys one or more of the fundamental attributes of ownership—the right to possess, to exclude others, and to dispose of property. If a regulation does not infringe on a fundamental attribute of ownership, and if it protects the public from one of the foregoing listed harms, then no constitutional "taking" requiring just compensation exists.*[29]

If a regulation enhances a publicly-owned right in property, or violates one of the fundamental rights of ownership, then further inquiry is needed to determine if a compensable taking has occurred.[30]

First, **if the regulation does not advance a legitimate state interest, then a taking has occurred for which compensation is required.** The "legitimate state interest" analysis requires the community to state the nexus it is using to validate a limitation or exaction.

Second, **if on its face the regulation deprives the owner of all economically viable use of a property, a compensable taking has occurred.**[31]

To decide whether all reasonable use has been eliminated, the court must determine the property interest limited, and its effect on using the remainder of the property.

The reasonable use inquiry calls for a look at the entire parcel. Thus, if a wetland regulation deprives the owner of using one-third of the property, but the other two-thirds is available for use, the court most likely would find that a taking has not occurred.[32] Alternatively, if the regulation limited the use of the property solely to picnicking when surrounding lots were developed as housing, the court may find a taking—unless a strong case is made for undue hazard in the area, as in a flood way or storm surge area.[33]

Where a regulation does in fact materially interfere with use of a specific property, the courts look at several factors:

3. The Economic Impact of the Regulation on the Property[34]

If the cost of developing the property exceeds the return to be made from its sale, then the regulation is considered to have deprived the property of all economic benefit (even though some use may be made). The question is the "economic use" of the remaining property.

4. The Extent of the Regulation's Interference with Investment-Backed Expectations

Courts will look differently upon owners who have owned property for some time, and are caught in a world of changing regulations; and owners who purchased property at a substantially diminished price—reflecting a severe limitation —and then seek advantage under the taking clause to avoid the limitation.

5. The Character of the Government's Actions

This doctrine takes us back to the question of whether the limitation is to mitigate a problem caused by use or development of the property (which is lawful); or to advance a public interest not directly related to the use and development of the property (which is unlawful without compensation).[35]

6. Conditions on Land-Use Permits

When the court analyzes a claim that a condition imposed on a land use permit is a "taking," the court will consider four factors:

> *First, when the government conditions a land-use permit, it must identify a public problem or problems that the condition is designed to address. . . .*
>
> *Second, the government must show that the development for which a permit is sought will create or exacerbate the identified public problem. . . .*

> *Third, the government must show that its proposed condition or exaction (which in plain terms is just the government's proposed solution to the identified public problem) tends to solve, or at least to alleviate, the identified public problem. . . .*
>
> *Fourth, the government must show that its proposed solution to the identified public problem is "roughly proportional" to that part of the problem that is created or exacerbated by the landowner's development.* [36]

The first two factors seek to establish a relationship between the land-use project and the identified public problem.[37] The last two factors seek to establish a relationship between the identified public problem and the proposed solution to that problem. If the proposed condition or exaction is reasonably related to all or part of an identified public problem that is created or exacerbated by the development project, the courts will uphold the condition.

"Taking" cases and due process limitations on regulations are among the most complex and least understood of all guidelines for regulatory actions. According to one commentator on land use law, "[r]egulatory taking doctrine is the most perplexing area of American land use law."[38]

PRACTICE TIP: ***Councils and commissions should take several actions to assure that legislation, as written and applied, meets constitutional scrutiny:***

- ***Identify the public purpose to be accomplished.***
- ***Identify the connection between the harm to be avoided and the regulation or limitation on action the ordinance requires.***
- ***When limiting use of a property (either by use limitations or prohibitions), make sure that the limitation or prohibition still permits a reasonable use of the remainder of the property.***

This information is not intended to be a definitive analysis of constitutional issues affecting municipal regulation. However, municipal officials can take heart: the courts recognize that planning a community is a difficult task, and there is a need to give due deference to local planning actions. As one Superior Court Judge commented (paraphrased), "I do not get paid to sit in hearings to one o'clock in the morning or to choose between conflicting and competing needs of the community. That is the job of your elected officials. I do not rule on the wisdom of the rule adopted, only that the rules of adoption were properly followed."[39]

If municipal officials are careful to identify these central themes of constitutionality, the courts will most likely uphold their enactments.

For further information, commissions may wish to review the Attorney General's memorandum on the taking issue, created

as part of the growth management planning process.[40] It provides important additional information on constitutional rights and responsibilities of planning.

ENDNOTES FOR CHAPTER 4

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1 See Munns v. Martin, 131 Wn.2d 192, 930 P.2d 318 (1997) (the Washington Supreme Court grappled with the question of whether Walla Walla's historic preservation ordinance violated the Constitution when applied to a church structure. The court held that the city's ordinance mandating up to a 14 month waiting period before such facilities could be demolished was unconstitutional).

2 Pease Hill v. County of Spokane, 62 Wn. App. 800, 806, 816 P.2d 37 (1991); Bass Partnership v. King County, 79 Wn. App. 276, 281, 902 P.2d 668 (1995).

3 Glaspey & Sons v. Conrad, 83 Wn.2d 707, 711, 521 P.2d 1173 (1974); Responsible Urban Growth v. Kent, 123 Wn.2d 376, 386, 868 P.2d 861 (1994).

4 Wenatchee Reclamation District v. Mustell, 102 Wn.2d 721, 725-726, 684 P.2d 1275 (1984); Sheep Mt. Cattle Co. v. Department of Ecology, 45 Wn. App. 427, 726 P.2d 55 (1986), review denied, 107 Wn.2d 1036 (1987).

5 Under the Land Use Petition Act, a challenge to a land use decision brought in superior court must name the owner of the property at issue. If the owner is not known, the person identified as the taxpayer in the records of the county assessor must be named. RCW 36.70C.040(2)(c).

6 Presbytery of Seattle v. King County, 114 Wn.2d 320, 330-331, 787 P.2d 907, cert. denied, 498 U.S. 911 (1990); Sintra, Inc. v. City of Seattle, 119 Wn.2d 1, 829 P.2d 765 (1992); Robinson v. City of Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992); Christianson v. Snohomish Health District, 133 Wn.2d 647, 946 P.2d 768 (1997); Guimont v. Seattle, 77 Wn. App. 74, 896 P.2d 70 (1995); Brutsche v. Kent, 78 Wn. App. 370, 898 P.2d 319 (1995).

7 Christianson v. Snohomish Health District, 133 Wn.2d at 661.

8 See Mission Springs v. City of Spokane, 134 Wn.2d 947, 954 P.2d 250 (1998) (city council's withholding for two months of grading permit for which developer had already satisfied statutory and ordinance criteria, so that additional traffic impact studies could be completed, constituted deprivation of property right without due process); Lester v. Town of Winthrop, 87 Wn. App. 17, 939 P.2d 1237 (1997) (a slight delay in the issuance of a permit to consider a condition of approval that is ultimately determined to be unlawful was not a violation of due process); Thurston County Rental Owners Ass'n v. Thurston County, 85 Wn. App. 171, 931 P.2d 208 (1997) (septic system regulations found to be reasonably related to protecting health and safety of County residents).

9 Presbytery, 114 Wn.2d at 320; Christianson, 133 Wn.2d at 665. See also Weden v. San Juan County, 135 Wn.2d 678, 706-07, ____ P.2d _____ (1998) ("It defies logic to suggest an ordinance is unduly oppressive when it only regulates the activity which is directly responsible for the harm.").

10 Christianson v. Snohomish Health District, 133 Wn.2d at 665; Guimont v. Clarke, 121 Wn.2d 586, 610, 854 P.2d 1 (1993), cert. denied, 114 S. Ct. 1216 (1994) (quoting Presbytery, 114 Wn.2d at 331); accord Sintra v. Seattle, 119 Wn.2d at 22.

11 Robinson v. City of Seattle, 119 Wn.2d 34, 521, 830 P.2d 318 (1992).

12 Burien Bark Supply v. King County, 106 Wn.2d 868, 871, 725 P.2d 994 (1986) (citations omitted).

13 Id. at 871 (citations omitted).

14 Anderson v. City of Issaquah, 70 Wn. App. 64, 75-76, 851 P.2d 744 (1993).

15 See also Western Homes v. Issaquah, 1998 WL 184900 (Wn. App. Div. 1, April 20, 1998) (the court found the City's bonus point award system to be unconstitutionally vague. The ordinance allowed a range of densities, but contained largely subjective and arbitrary standards for awarding higher densities).

16 Andersen, 70 Wn. App. at 78.

17 More recently, however, the Washington Supreme Court has stated that specific standards are not necessary; general standards are sufficient. See Sunderland Family Treatment Services v. City of Pasco, 127 Wn.2d 782, 796-797, 903 P.2d 986 (1995).

18 Nollan v. California Coastal Comm., 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987).

19 Dolan v. City of Tigard, 512 U.S. 374, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994).

20 Id. 129 L. Ed. 2d at 315.

21 Id. at 320.

22 Id. at 320 n. 8.

23 See Snider v. Board of County Commissioners, 85 Wn. App. 371, 932 P.2d 704 (1997) (because the county had conditioned a developer's subdivision approval on obtaining rights-of-way from third parties, but had not required the developer to dedicate any of his own property, the court distinguished the case from Dolan, reasoning that the county had not physically taken any of his property). But see Benchmark v. City of Battle Ground, ___ Wn. App. _____, _____ P.2d _____ (Div. II 1999) ("We decline to follow Snider . . . ")

24 Unlimited v. Kitsap County, 50 Wn. App. 723, 750 P.2d 651, review denied, 111 Wn.2d 1008 (1988).

25 Washington State Constitution, Article I § 16.

26 The U.S. Supreme Court in Suitum v. Tahoe Reg. Plan. Agency, 137 L Ed 2d 980 (1997) held that where a landowner received a final decision from an agency denying the right to construct a house on her undeveloped lot, even though she had not yet attempted to sell her transferable development rights, her § 1983 regulatory taking claim was ripe,

27 Carlson v. Bellevue, 73 Wn.2d. 41, 435 P.2d 957 (1968).

28 Presbytery, 114 Wn.2d at 329.

29 Id. at 329-330.

30 See Ventures Northwest v. State, 81 Wn. App. 342, 914 P.2d 756 (1996) (a claim that enforcement of a land use regulation has resulted in an unconstitutional taking is not established unless the property owner establishes that the regulation proximately caused the loss).

31 Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016, 120 L.Ed 2d 798, 112 S. Ct. 2886 (1992); See Sintra v. City of Seattle, 131 Wn.2d 640, 935 P.2d 555 (1997) (where a property owner in a temporary regulatory taking loses use of the monetary value of property from time of taking until payment is made, payment of interest is required as part of just compensation).

32 Presbytery, 114 Wn.2d at 334.

33 Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992).

34 Ventures Northwest Limited Partnership v. State, 81 Wn. App. 353, 363, 914 P.2d 1180 (1996) (an owner claiming loss of the economically viable use of property must show that the challenged government regulation proximately caused the loss of all such use).

35 See Manufactured Housing v. State, 90 Wn. App. 257, 270, 951 P.2d 1142 (1998). (the court held that the Mobile Home Parks-Resident Ownership Act, by offering tenants a right of first refusal, did not destroy a fundamental attribute of property ownership enjoyed by the owner or constitute a taking by physical invasion by a new owner after a sale).

36 Burton v. Clark County, 91 Wn. App. 505, 520-23, 958 P.2d 353 (1998).

37 Id. at 524.

38 Presbytery, 114 Wn.2d at 323.

39 Hewett Henry, J., Thurston County, in response to a request by an appellant that a city had made the wrong choice in ruling on a hotly contested case.

40 Attorney General Memorandum entitled "Recommended Process and Advisory Memorandum for Evaluation of Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property," March 1995. The Attorney General's Office has indicated that it intends to publish an update of this advisory memorandum within the next year.